

U.S. Patent Application Serial No. **10/566,085**
Amendment filed April 2, 2010
Reply to OA dated November 2, 2009

REMARKS

Claims 3, 4 and 6 are pending in this application as of entry of the amendment of February 25, 2010. Claim 6 is canceled herein without prejudice or disclaimer. Upon entry of this amendment, claims 3 and 4 will be pending. Entry of this amendment and reconsideration of the rejections are respectfully requested.

No new matter has been introduced by this Amendment.

Claims 3-6 [sic] are rejected under 35 U.S.C. 101 because the claims read on the organism per se which is found in nature and thus, is unpatentable to applicant. (Office action page 3)

Claims 4, 6-8, 15 and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. (Office action page 3)

Claims 4, 6-8, 15 and 18 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. (Office action page 4)

Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Matrozza (US Patent no. 4,579,740). (Office action page 6)

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Claims 4-5 [sic] are rejected under 35 U.S.C. 103(a) as being unpatentable over Hata et al (U.S. Patent No. 4,314,995). (Office action page 6)

Claims 4-5 [sic] are rejected under 35 U.S.C. 103(a) as being unpatentable over Asahara et al. (Antimicrobial Agents and Chemotherapy, June 2001, Vol. 45, p. 1751-1760) taken with Ouwehand et al. (Journal of Food Science, Vol. 66, No. 6, pages 856-858, 2001). (Office action page 6)

The rejections of claims 5-8, 15 and 18 are moot, as those claims are not pending as of the present amendment. Consideration of Applicant's arguments regarding pending claims 3 and 4, made in the Response filed on February 25, 2010, is respectfully requested.

In addition, in the Advisory action, in regard to the rejection under 35 U.S.C. 112, second paragraph, the Examiner states that:

“It is noted that the amendment to claim 4 recites ‘freeze-dried bacterial cells or wet bacterial cells’. Moreover, Applicant has not explained with any particularity the nexus between determination whether cells are ‘dead’ or ‘live’ and the recitation of ‘purified bacterial cells or freeze-dried bacterial cells’. Therefore, the rejection is deemed proper and it is maintained for the reasons of record.”

In response, Applicant maintains that this recitation in claim 4 is definite. Applicant notes that the relevance of Examiner's comment regarding “dead” or “live” cells is not completely clear, since the terms “dead” and “live” do not occur in the claims. However, the terminology “freeze-dried bacterial cells or wet bacterial cells” of claim 4 is well defined in the specification, as can be seen by reference to the Manufacturing Examples of the specification (pages 48-49).

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For example, Manufacturing Examples 4 and 5 describe that the **live** cell content of the bacterial preparation (purified cell) was 1×10^{11} and 2×10^{11} cells/g, respectively. And Manufacturing Example 2 (pages 47-48) describes that the resulting preparation consisted of "... freeze-dried bacterial cells, ... wet bacterial cells," Moreover, no disinfectant treatment is applied in Manufacturing Example 2.

Therefore, it is clear that the freeze-dried bacterial cells and wet bacterial cells contain a high live cell content, i.e., they are used as live cells.

Reconsideration of the rejections is respectfully requested.

If, for any reason, it is felt that this application is not now in condition for allowance, the Examiner is requested to contact the applicants' undersigned agent at the telephone number indicated below to arrange for an interview to expedite the disposition of this case.

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In the event that this paper is not timely filed, the applicants respectfully petition for an appropriate extension of time. Please charge any fees for such an extension of time and any other fees which may be due with respect to this paper, to Deposit Account No. 01-2340.

Respectfully submitted,

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Enclosures: Request for Continued Examination (RCE)
Petition for Extension of Time

H:\060\060076\Amendment Accompanying RCE